Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS,
GRANT WOODS, ARIZONA Attorney General,

PETITIONERS,

-VS-

PETER ALLEN JACOBY,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals err by ruling that a state appellate court's review for fundamental error in criminal cases vitiates any procedural bar created by a defendant's failure to raise an issue at trial?

2. Did the Ninth Circuit Court of Appeals err by reversing the defendant's convictions for burglary, theft and trafficking in stolen property on the basis that a jury instruction regarding inferences to be drawn from the possession of recently stolen property improperly shifted the burden of proof?

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In 1990, the Arizona Court of Appeals affirmed Jacoby's convictions and sentences for one count of burglary, four counts of theft, and one count of trafficking in stolen property. The court rejected, among other arguments, Jacoby's contention that a jury instruction—to which Jacoby did not object at trial—regarding inferences to be drawn from possession of recently stolen property, improperly shifted the burden of proof. The Arizona Court of Appeals ruled that, absent fundamental error, Jacoby had waived this claim by failing to object to the instruction at trial. The court further ruled that the instruction did not constitute fundamental error. *State v. Jacoby*, 2 CA-CR 89-0248 and 2 CA-CR 89-0249 (Consolidated), Memorandum Decision (Ariz. Ct. App., Apr. 19, 1990), attached as Appendix A. The Arizona Supreme Court declined to accept review of the court of appeals decision. (Order, dated Dec. 18, 1991, Appendix B.)

The United States District Court for the District of Arizona denied Jacoby's petition for writ of habeas corpus. The court declined to address the State's argument that Jacoby was procedurally barred from raising the jury instruction issue. Nevertheless, the court denied the petition, ruling that the jury instruction did not impermissibly shift the burden of proof. (Order, dated Aug. 20, 1992, Appendix C.)

The Ninth Circuit Court of Appeals reversed the district court's denial of Jacoby's petition for writ of habeas corpus. The court ruled that, because the Arizona Court of Appeals addressed the jury instruction issue as part of a fundamental error analysis, the issue was not precluded from review in a federal habeas proceeding. The Ninth Circuit Court of Appeals further ruled that giving the jury instruction at issue constituted error justifying the reversal of Jacoby's convictions. *Jacoby v. Lewis*, No. 92-16583, Memorandum Decision, dated Sept. 30, 1993, attached as Appendix D.

STATEMENT OF JURISDICTION

The State of Arizona seeks review of the Ninth Circuit Court of Appeals' decision in *Jacoby v. Lewis*, filed on September 30, 1993. (Appendix D.) Arizona filed a timely petition for rehearing on October 13, 1992, which the Ninth Circuit Court of Appeals denied by order dated November 17, 1993. (Appendix E.) The present petition for writ of certiorari was timely filed on February 15, 1992.

This Court has jurisdiction to review the opinion of the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254 (a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On March 18, 1988, a Tucson, Arizona resident reported a residential burglary involving over $1,000 of property, including a clarinet. Shortly thereafter, the victim called several music shops in Tucson, including Dave's Music Shop, to ask about the clarinet. Within an hour, two men brought the victim's clarinet to Dave's Music Shop. The shop owner recognized the victim's clarinet, and purchased it from the men. The shop owner contacted the police and gave them a description of the truck the men with the clarinet were driving. Police officers subsequently learned that the truck belonged to Jacoby's father, and that Jacoby had been using it.

On March 25, 1988, police officers found Jacoby and the truck, and charged Jacoby with trafficking in stolen property. The officers searched the truck, and found property belonging to the victim and to three other individuals whose homes had been burglarized the previous day.

After returning the truck to Jacoby, police officers decided to monitor Jacoby's activities, and followed him while he drove slowly through a neighborhood. Jacoby studied several houses before stopping at one of them. When he drove away, police officers checked the residence and found that it had been burglarized. The officers stopped Jacoby and arrested him, finding property from the residence Jacoby had just left.

Jacoby's fingerprints were subsequently found on a candy dish taken from the same residence.

Jacoby told police officers that the property in the truck belonged to him. Jacoby admitted that he burglarized the last residence and stole the owner's property. A police detective subsequently questioned Jacoby about three other burglaries, and Jacoby admitted committing them. Jacoby further admitted selling the clarinet stolen from one of the residences.[1]

The State charged Jacoby with five counts of burglary, five counts of theft, and one count of trafficking in stolen property. Following a jury trial, Jacoby was convicted of all five counts of theft, one count of burglary, and one count of trafficking in stolen property. On April 24, 1989, the trial court sentenced Jacoby to seven concurrent prison terms, with the longest being a term of 12½ years.

Jacoby appealed his convictions and sentences to the Arizona Court of Appeals, contending, among other things, that the following instruction to the jurors improperly shifted the burden of proof:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in the theft.

---

1. Jacoby testified at trial, and admitted burglarizing the residence at which he was arrested. He recanted, however, his confessions regarding the other burglaries and thefts.

Jacoby argued that the trial court should have used the phrase "may give rise," instead of "gives rise," to reflect a 1987 amendment to A.R.S. § 13-2305(1).

The Arizona Court of Appeals rejected Jacoby's argument. The court found that, because Jacoby had not objected to the instruction at the time it was given, he waived his right to challenge the objection absent a finding of fundamental error. The court then engaged in a fundamental error analysis, and found specifically that giving the instruction in question did not constitute fundamental error.

Jacoby filed a petition for writ of habeas corpus in federal district court, challenging three of his theft convictions and his trafficking in stolen property conviction. Jacoby again argued that the same jury instruction was improper. Although the court declined to address the State's argument that Jacoby was procedurally barred from raising the jury instruction issue, the court denied the petition, ruling that the jury instruction did not impermissibly shift the burden of proof to Jacoby.

Jacoby petitioned for review to the Ninth Circuit Court of Appeals, and that court reversed the district court's ruling. The Ninth Circuit Court of Appeals rejected the State's procedural default argument, ruling that, because the Arizona Court of Appeals addressed the jury instruction issue as part of a fundamental error analysis, the issue was not precluded despite Jacoby's failure to object to the instruction at trial. Notwithstanding

Jacoby's admission at trial that he burglarized one of the residences, and notwithstanding evidence that there was stolen property in the back of Jacoby's truck after he was seen "casing" a neighborhood, the Ninth Circuit further ruled that giving the above jury instruction constituted error justifying the reversal of Jacoby's convictions.

ARGUMENTS

I

THE NINTH CIRCUIT COURT OF APPEALS ERRED BY RULING THAT A STATE APPELLATE COURT'S REVIEW FOR FUNDAMENTAL ERROR IN CRIMINAL CASES VITIATES ANY PROCEDURAL BAR CREATED BY A DEFENDANT'S FAILURE TO RAISE AN ISSUE AT TRIAL. THIS COURT SHOULD ACCEPT REVIEW OF THIS CASE BECAUSE THAT RULING OBLITERATES THE CONCEPT OF PROCEDURAL DEFAULT IN ARIZONA FOR ERRORS WAIVED AT TRIAL, AND IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

A federal habeas corpus petitioner who has procedurally defaulted in state court is barred from relief in federal court. *Coleman v. Thompson*, 501 U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *see also Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); 501 U.S. ___, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). A defendant's failure to raise an issue during trial constitutes an independent and adequate state procedural ground sufficient to foreclose collateral federal review of claimed constitutional error so long as the state has a contemporaneous

objection rule and has not waived its enforcement. *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

The State of Arizona has a contemporaneous objection rule. Rule 21.3(c) of the Arizona Rules of Criminal Procedure codifies the rule with regard to objections to jury instructions:

> **Waiver of error.** No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof or to the submission or failure to submit a form of verdict unless he objects thereto before the jury retires to consider its verdict.

Arizona appellate courts apply the contemporaneous objection rule, and have ruled that a failure to object to jury instructions at trial waives any objection on appeal. *State v. Gendron*, 168 Ariz. 153, 812 P.2d 626 (1991); *State v. Valles*, 162 Ariz. 1, 780 P.2d 1049 (1989); *State v. White*, 160 Ariz. 24, 770 P.2d 328 (1989). In *Gendron*, the Arizona Supreme Court stated:

> Our adversarial system properly and necessarily precludes injection of new issues on appeal. The reason for this well-recognized rule is simplicity itself—without the rule, the system won't work. In extremely limited circumstances, we recognize that some issues may be so important that overriding considerations concerning the integrity of the system will excuse a party's failure to raise the issue in the trial court. This limited exception is known as the doctrine of fundamental error. . . .
>
> Fundamental error is error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial. . . .

> Error is fundamental when it reaches the foundation of the case of takes from the defendant a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial.

Gendron, 168 Ariz. at 155, 812 P.2d at 628.

The rationale underlying the contemporaneous objection rule is obvious—an on-the-spot objection gives the trial court the opportunity to correct any possible mistakes in a jury instruction before the instruction is submitted to the jurors. *Wainrwright v. Sykes*, 433 US. at 88–89. It enables a record to be made when recollections are fresh—not years later in a federal habeas proceeding. *Id.*

In the present case, the State of Arizona has not waived enforcement of the contemporaneous objection rule. When the jury instruction issue was raised on direct appeal, the State objected on the basis of waiver, and the Arizona Court of Appeals expressly rejected the claim on that basis:

> We also note that the trial counsel did not object to this instruction, thereby waiving all but fundamental error. The giving of this instruction has expressly been held to not constitute fundamental error. A verdict should only be overturned based upon the giving or refusal to give a jury instruction when the instructions, taken as a whole, are such that it is reasonable to suppose the jury was misled.
>
> . . . .
>
> The giving of the instruction on proof of possession of stolen property was not fundamental error.

(Appendix A at 6–7.)

The fact that the Arizona Court of Appeals engaged in a fundamental error analysis does not suggest that it did not rely on a procedural bar in the present case. In fact it suggests the opposite. The Arizona Court of Appeals only looks for "fundamental error" if it concludes that a defendant has waived all other claims on appeal. Thus, by engaging in such an analysis, the Arizona Court of Appeals necessarily found that Petitioner waived his right to raise the issue in question on appeal.

Under the rationale suggested by the Ninth Circuit Court of Appeals in the present case, procedural default no longer exists in Arizona for errors waived at trial. Because Arizona appellate courts review every criminal case for fundamental error, a criminal defendant will never be found to have procedurally defaulted on any issue raised on appeal even though the defendant failed to raise the issue at trial. Such a result is inconsistent with *Coleman v. Thompson*, *Harris v. Reed*, and *Wainwright v. Sykes*, and should be rejected by this Court.

The Ninth Circuit's approach in this case, as well as in another recent decision, *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993),[2] directly

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2. In *Beam v. Paskett*, the Ninth Circuit Court of Appeals ruled that, even if a defendant in a capital case fails to present a sentencing claim to the state of Idaho's appellate courts, the claim will not be precluded in federal court because the Idaho appellate courts have an affirmative duty to review the entire record in a capital case for errors in sentencing regardless whether the defendant raised the error at trial. 3 F.3d at 1306.

contradicts the approach taken by the First Circuit Court of Appeals. In *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987), the First Circuit rejected an argument virtually identical to that advanced by Jacoby in the instant case. In *Puleio*, the defendant failed at trial to challenge a jury instruction defining malice aforethought. Because Massachusetts law provides that an appellate court may reach the merits of an issue, notwithstanding procedural default, to determine whether a miscarriage of justice likely occurred, the Massachusetts Supreme Judicial Court engaged in a harmless error analysis. *Puleio*, 830 F.2d at 1200. Notwithstanding the Massachusetts' court's harmless error analysis, the First Circuit rejected the defendant's claim on the basis of procedural default, finding that state court "review under the discretionary state miscarriage of justice standard will not suffice, in and of itself, to bypass the Commonwealth's contemporaneous objection rule." *Id. See also Tart v. Commonwealth of Massachusetts*, 949 F.2d 490 (1st Cir. 1991) (mere fact that state appellate court has engaged in discretionary review under "miscarriage of justice" analysis does not indicate that the reviewing court has determined to waive independent state procedural ground for affirming conviction).

Petitioner urges this Court to accept review of this case to resolve the conflict between the Ninth Circuit and the First Circuit. The fact that a state appellate court extends to a criminal defendant the additional benefit

of a discretionary review for fundamental error should not result in the obliteration of rules governing waiver and preclusion. The approach taken by the First Circuit Court recognizes this principle, and should be adopted by this Court.

II

THE NINTH CIRCUIT COURT OF APPEALS ERRED BY REVERSING THE DEFENDANT'S CONVICTIONS FOR BURGLARY, THEFT, AND TRAFFICKING IN STOLEN PROPERTY ON THE BASIS THAT A JURY INSTRUCTION REGARDING INFERENCES TO BE DRAWN FROM THE POSSESSION OF RECENTLY STOLEN PROPERTY IMPROPERLY SHIFTED THE BURDEN OF PROOF.

A. *The Instruction at Issue Was Not Improper.*

Even if Jacoby had not waived his claim on appeal by failing to object to the instruction during trial, his convictions should be affirmed because the instruction was not error. The instruction, when considered in light of defense counsel's closing argument, and in light of the other instructions given to the jurors, did not compel a finding of guilt based solely on Jacoby's possession of recently stolen property.

During Jacoby's closing argument, his attorney discussed at length the possession of recently stolen property instruction:

> One of the instructions you are going to receive is proof of possession of recently stolen property unless satisfactorily explained gives rise—that's the wrong instruction, excuse me. That's an instruction the State will have.

> If you determine that the defendant possessed property recently stolen from the building which is the subject of the alleged burglary, that circumstance in and of itself is not enough to permit you to find the defendant guilty of burglary. In addition to proof of possession of such property there must be proof of corroborating circumstances tending of themselves to establish guilt.
>
> Just the fact to begin with that that property was in Peter Jacoby's truck, if you believe he knew it was there and he possessed it, isn't of itself enough to be found guilty of the burglary. The corroborating evidence, the invalid, the involuntary confession, un-uh. Throw it out of your mind. That confession is tainted.
>
> The fact that that property was in Peter Jacoby's truck doesn't make him guilty of theft either. If there is a valid explanation for it and Peter Jacoby has given us the explanation. The explanation being that it was Eric Warn's property and not Peter Jacoby's property.

The trial court instructed the jurors that Jacoby was presumed innocent and that that presumption alone was sufficient to acquit him of the charges. The trial court also instructed the jurors on the State's burden of proof, including that the State "must prove each element of the alleged crime or crimes beyond a reasonable doubt." Finally, the trial court described how the jurors should consider inferences, explaining as follows:

> So while you should consider only the evidence in the case you are permitted but not required to draw such reasonable inferences from testimony and exhibits as you feel justified in the light of common sense and experience.
>
> The word infer or the expression to draw inference means to find that a fact exists based on proof of another fact. An inference *may* be drawn only if it is reasonable and

> logical, not if it is speculative. Therefore in deciding whether to draw a particular inference you must look at and consider all of the facts in the light of reason, common sense and experience. *After you have done that the question of whether to draw a particular inference is for you to decide.*

(Emphasis added.)

In light of all of the instructions given to the jurors in the present case, the instruction at issue did not compel a finding of guilt based solely on Jacoby's possession of recently stolen property. "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made to the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). This is not such a case. Jacoby's convictions should be affirmed.

B. *The Ninth Circuit Court of Appeals' Harmless Error Analysis Is Inconsistent With Controlling Authority From This Court.*

In reversing the district court's denial of Jacoby's habeas petition, the Ninth Circuit Court of Appeals applied the following harmless error standard:

> To establish harmless error, the state must convince this court that "there is no reasonable possibility that the error materially affected the verdict or, in other words, that the error was harmless beyond a reasonable doubt."

Appendix D at ___. That standard is *inconsistent* with the harmless error standard set forth by this court in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710 (1993), and should be rejected by this Court.

In *Brecht v. Abrahamson*, this Court rejected the very standard cited by the Ninth Circuit in the present case:

> [G]ranting habeas relief merely because there is a "reasonable possibility" that trial error contributed to the verdict, . . . is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has "grievously wronged." Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" which accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice."

113 S. Ct. at 1721. This Court ruled that the proper standard to determine whether error is harmless is "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1722. This Court further ruled that under this standard, "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Id.*

Because the harmless error standard applied by the Ninth Circuit in this case is inconsistent with that set forth by this Court in *Brecht v. Abrahamson*, the Ninth Circuit's ruling in this case should be set aside.

CONCLUSION

This Court should accept review in this case to resolve the conflict between the Ninth Circuit and the First Circuit on the issue of whether a state appellate court's review for fundamental error in a criminal case vitiates any procedural bar created by a defendant's failure to raise an issue at trial. This Court should adopt the approach taken in the First Circuit, and reject the Ninth Circuit's decision to address the merits of Jacoby's claim notwithstanding his failure to raise the claim at trial.

This Court should also accept review of this case because the Ninth Circuit erred by concluding that the trial court improperly instructed the jurors on inferences to be drawn from possession of recently stolen property, and because the Ninth Circuit applied an incorrect harmless error standard. The instruction given at trial was not improper, and did not shift the burden of proof to Jacoby. Jacoby's convictions should be affirmed.

Respectfully submitted,

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APPENDIX A

[Filed April 19, 1990]

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

STATE OF ARIZONA,	)	2 CA-CR 89-0248 and
	)	2 CA-CR 89-0249
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT A
	)	
PETER ALLEN JACOBY,	)	MEMORANDUM DECISION
AKA PETER ALLAN JACOBY	)	Not for Publication
	)	Rule 111, Rules of
Appellant.	)	the Supreme Court
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-23965 and CR-24274 (Consolidated)

Honorable Bernardo P. Velasco, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

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R O L L , Judge

Peter Allen Jacoby appeals from convictions for burglary, theft, and trafficking in stolen property. For the reasons set forth below, we affirm in part and reverse and remand in part.

FACTS

A series of residential burglaries occurred in Tucson between March 11, 1988 and April 5, 1988. On March 18, 1988, a burglary occurred at Dr. Paul Finley's Tucson residence and over $1,000 worth of property was stolen. That same day, two people went to a music store and attempted to sell a clarinet stolen from the Finley residence. The owner of the store recognized the clarinet as belonging to Dr. Finley, bought the clarinet, and wrote down the license number of the truck in which the men arrived. On March 25, the police located Jacoby and the truck. Jacoby was arrested and

the truck impounded. A search of the truck disclosed additional items taken from the Finley residence as well as property taken from the residences of Joyce Woolever and John and Betty Wieland during burglaries which occurred on March 24, 1988. The truck was returned to Jacoby on April 4, and on April 5, 1988, surveillance officers observed Jacoby drive to and enter the Tucson residence of Don Klove. After Jacoby left the Klove residence, a police officer confirmed that the house had been burglarized. Jacoby was stopped and property stolen from the Klove residence was found in his possession. Jacoby first told the officers that he had been to a park and that the property in the truck belonged to him. Shortly thereafter, he admitted burglarizing the Klove residence. When Jacoby was subsequently interviewed by a detective, Jacoby stated that he burglarized the Finley, Woolever, and Wieland homes, and had sold the clarinet taken from the Finley residence.

PROCEDURAL HISTORY

Jacoby was charged in two indictments which were consolidated for trial.[1] At trial, Jacoby admitted committing the Klove burglary and theft. He also admitted telling a detective that he had committed the Woolever, Wieland, and Finley burglaries and thefts with which he was charged but claimed that these admissions were untrue. Jacoby offered several reasons form lying to the detective, including the fact that he had a severe cocaine problem, was suffering from withdrawal, and did not know what he was doing.

Jacoby was convicted of burglary of the Klove residence, theft by control of property taken from the residences of Klove, Finley, Woolever, and Wieland, and trafficking in property stolen from the Finley residence. He was found not guilty of unlawful possession of cocaine, and the jury was unable to reach verdicts as to the remaining charges.

---

[1]/ In the indictment returned in CR-23965, Jacoby was charged with burglary of and theft from the Klove residence on April 5, 1988. In CR-24274, Jacoby was named in 12 counts of the indictment, including burglary of and theft from the Carruther residence on March 11, 1988, the Noyes residence on March 15, 1988, the Finley residence on March 18, 1988, and the Woolever and Wieland residences on March 24, 1988, and trafficking in property stolen from the Finley residence, specifically the clarinet.

ISSUES ON APPEAL

On appeal, Jacoby argues (1) the trial court erred in instructing the jury regarding the proof of possession of recently stolen property, (2) Jacoby's convictions for both theft of property and trafficking in stolen property violate constitutional principles of double jeopardy as well as the Arizona statute concerning double punishment, (3) improper sentence enhancement occurred, (4) the trial court erred in sentencing Jacoby to aggravated sentences with prior convictions as to certain counts, and (5) the trial court erred when it communicated with the jury regarding the value of the property.

Jury Instruction on Recent Possession of Stolen Property

Jacoby argues that the trial court erred when it instructed the jury:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in it's [sic] theft.

The instruction tracked the language contained in A.R.S. § 13-2305(1) prior to 1987. In 1987, the statute was amended to replace the phrase "gives rise" with "may give rise." Jacoby maintains that this instruction constituted a mandatory presumption subverting the presumption of innocence and invading the truth finding prerogatives of the jury, citing Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); Carella v. California, ___ U.S. ___, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (Per Curiam), reh'g denied, ___ U.S. ___, 110 S. Ct. 23, ___ L. Ed. 2d ___ (1989). Neither Francis ("acts of person of sound mind and discretion are presumed to be the product of the person's will . . . .," 471 U.S. at 308, 105 S. Ct. at 1967, 85 L. Ed. 2d at 348) nor Carella (a person who willfully and intentionally fails to return a leased or rented vehicle within five days after lease or rental agreement expired "shall be presumed to have embezzled the vehicle," ___ U.S. at ___, 109 S. Ct. at 2420, 105 L. Ed. 2d at 221) involved the language presented in the matter before us.

In State v. Mohr, 150 Ariz. 564, 724 P.2d 1233 (App. 1986), Division One of this court held that a nearly identical instruction

unconstitutionally shifted the burden of proof on the element of knowledge. In Mohr, Division One concluded that the phrase "gives rise" in effect told the jury that it must find knowledge once the state proved that the possessed property was recently stolen and the possessor fails to tender a satisfactory explanation. 150 Ariz. at 567, 724 P.2d at 1236.

In State v. Dickson, 127 Ariz. 554, 560, 622 P.2d 501, 507 (App. 1980), this court held that the identical instruction of which Jacoby now complains involved a permissible inference, was not a comment on the evidence, and did not violate the due process principles enunciated in Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). See also State v. Van Winkle, 126 Ariz. 476, 477, 616 P.2d 936, 937 (App. 1980).

We also note that trial counsel did not object to this instruction, thereby waiving all but fundamental error. State v. Valles, 162 Ariz. 1, ___, 780 P.2d 1049, 1054 (1989). The giving of this instruction has expressly been held to not constitute fundamental error. Dickson, supra; Van Winkle, supra. A verdict should only be overturned based upon the giving or refusal to give a jury

instruction when the instructions, taken as a whole, are such that it is reasonable to suppose the jury was mislead. State v. Schrock, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986). In the matter before us, the trial court further instructed the jury regarding the drawing of inferences and the significance thereof:

> So while you should consider only the evidence in the case you are permitted but not required to draw such reasonable inferences from testimony and exhibits as you feel justified in the light of common sense and experience.
>
> The word infer or the expression to draw inference means to find that a fact exists based on proof of another fact. An inference may be drawn only if it is reasonable and logical, not if it is speculative. Therefore in deciding whether to draw a particular inference you must look at and consider all of the facts in the light of reason, common sense and experience. After you have done that the question of whether to draw a particular inference is for you to decide.

The giving of the instruction on proof of possession of stolen property was not fundamental proof.

Double Jeopardy and Double Punishment

Jacoby was convicted of theft of various items from the residence of Paul Finley, including a clarinet, a compact disc player, a camera and accessories, a stereo cassette player, speakers, and other items. Jacoby was also found guilty of trafficking in stolen property, to wit, the same clarinet referred to in the theft count. The trial court enhanced several of Jacoby's other convictions[2] by designating the theft and trafficking counts as prior convictions.

A. A.R.S. § 13-604 (H)

Jacoby argues that the theft and trafficking counts, counts six and seven respectively, occurred on the "same occasion," and therefore count six could not be used to enhance the sentence on count seven. Count six cannot be a Hannah prior to count seven is both offenses occurred on the same occasion. A.R.S. § 13-604(H); State v. Hannah, 126 Ariz. 575, 576-77, 617 P.2d 527, 528-29 (1980). Jacoby argues that because these two offenses occurred in "spatio-temporal proximity," they form the same criminal episode. State v. Henry, 152 Ariz. 608, 612, 734 P.2d 93, 97 (1987).

---

[2]/ Specifically, counts 9, 11, 16, and 17.

Jacoby argues that because the jury could not reach a verdict as to the Finley burglary count, the only evidence that Jacoby controlled Finley's property arose from evidence that Jacoby controlled the property when he trafficked in it. We disagree. Notwithstanding the jury's inability to reach a verdict regarding this burglary, evidence against Jacoby included a post-arrest statement that he personally stole the property from the Finley residence. Jacoby was also in possession of Finley's property when the police arrested him on March 25, 1988. Accordingly, Jacoby's control of Finley's property was not confined to the time when the clarinet was sold at the music store and was not limited to the clarinet. Accordingly, the two offenses did not occur on the "same occasion" for purposes of A.R.S. § 13-604(H). No error occurred when count six was used to enhance the sentence on count seven.

B. A.R.S § 13-116

Jacoby argues that his convictions for both theft and trafficking resulted in a violation of A.R.S. § 13-116, Arizona's double punishment statute, which provides as follows:

> An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other, to the extent the constitution of the United States or of this state require.

Focusing on the second sentence of the provision and utilizing the previously-mentioned argument, Jacoby maintains that the only evidence of theft by control consisted of evidence that he controlled the clarinet when he attempted to sell it to the music store. Jacoby contends that under the "identical elements" test, the evidence remaining after elements of the theft by control are eliminated is insufficient to support the elements of the trafficking charge, citing State v. Gordon, 161 Ariz. 308, 778 P.2d 1204. As we stated in our previous discussion of A.R.S. § 13-604(H), evidence as to Jacoby's control of the Finley property was not confined to possession of the clarinet in the music store. The clarinet was but one of many items stolen from the Finley residence in the burglary

to which Jacoby confessed. In addition, Jacoby possessed other Finley property when he was arrested seven days later. Accordingly, sufficient evidence supported the theft and trafficking convictions. These convictions were not based upon the same act or omission.

C. Double Jeopardy

Jacoby argues that the double jeopardy clauses of the state and federal constitutions preclude conviction on both counts six and seven. The state argues that Jacoby failed to raise this defense at trial and it was therefore waived. We agree that a defendant's double jeopardy claim can be waived, State v. Adamson, 140 Ariz. 198, 200, 680 P.2d 1259, 1261 (App. 1984), and that it was waived here.

D. Theft as Lesser-Included of Trafficking

Jacoby argues that theft is a lesser-included offense of trafficking in stolen property and, therefore, pursuant to A.R.S. § 13-111, he could not be convicted of theft.

A.R.S. § 13-111 provides:

> When the defendant is convicted or acquitted, or has once been placed in jeopardy upon an indictment or information, the conviction, acquittal or jeopardy is a bar to another indictment or information for the offense charged in either, or for an attempt to commit the offense, or for any offense necessarily included therein, of which he might have been convicted under the indictment or information.

Jacoby argues that before one can be guilty of trafficking in stolen property one must control the stolen property and, therefore, theft is a lesser-included offense of trafficking in stolen property. We reject this argument for the following reasons. The clarinet which was the basis of the trafficking count was but one of several items alleged to be the basis of the theft by control count. There was evidence that Finley possessed the clarinet and the other Finley property on occasions other than when he possessed the clarinet at the music store. When evidence of Jacoby's sale of the clarinet is disregarded, there is still evidence of his control of numerous other items stolen from the Finley residence. State v. Salazar, 24 Ariz.

App. 472, 475, 539 P.2d 946, 949 (App. 1975). We find no error on this ground.

Enhancement of Convictions

Jacoby argues that count 9, theft of the Woolever property, cannot be used as a Hannah prior to enhance his sentence on count 11, theft of the Wieland property, since both offenses occurred on the "same occasion." Jacoby maintains that both offenses occurred on the same occasion because (1) he was not convicted of burglaries yielding this property and (2) items from both burglaries were found in his possession on March 25, 1989.

We disagree that the only evidence of possession of the Woolever and Wieland property consisted of Jacoby's control of this property when his truck was searched. Since Jacoby confessed to having burglarized both residences, which burglaries occurred on March 24, 1988, there was evidence that this property was controlled by Jacoby prior to the time it was discovered in his truck on March 25, 1988. Because evidence existed that these items of property were possessed by Jacoby on other than the "same occasion," it was permissible to use count 9 as a Hannah prior conviction enhancing count 11. We

next address the use of these and other counts to enhance the sentences on counts 16 and 17.

Legality of Enhanced Sentences for Counts 16 and 17

Jacoby argues that the aggravated sentences of 12.5 years imposed on Jacoby in connection with the Klove burglary and theft are unlawful. Counts 16 and 17 were both enhanced by Hannah priors arising from Jacoby's convictions on counts 6, 7, 9, and 11.

A. Statutory Range

Jacoby argues that the prosecutor failed to allege that the counts in the indictment in CR-24274 were Hannah priors to the counts alleged in the indictment in CR-23965. The counts alleged in CR-23965 were consolidated with those alleged in CR-24274 and were renumbered counts 16 and 17. However, at no time prior to trial did the prosecutor allege that the original counts alleged in CR-24274 were Hannah priors for the counts charged in CR-23965. Jacoby maintains that although 12.5 years would have been within the 10- to 20-year range permitted by A.R.S. § 13-604 for a class three felony with two prior convictions, without the prior convictions the maximum range of sentence for counts 16 and 17 was 3.75 years

to 10 years. We agree. The state concedes that prior convictions must be alleged before trial commences. In State v. Rodgers, 134 Ariz. 296, 306, 655 P.2d 1348, 1358 (App. 1982), Division One of this court stated:

> [W]e hold that all allegations of prior convictions, including those made pursuant to A.R.S. § 13-604(H) must be made prior to trial . . . .

In State v. Bayliss, 146 Ariz. 218, 219-20, 704 P.2d 1363, 1364 (App. 1985), this court stated that it is imperative that the state furnish an accused with adequate notice of A.R.S. § 13-604 allegations of prior convictions. Nothing in State v. Hanson, 138 Ariz. 296, 303, 674 P.2d 850, 857 (App. 1983), or State v. Alder, 146 Ariz. 125, 131, 704 P.2d 255, 261 (App. 1985), relied upon by the state, compels a different conclusion.

The trial court impermissibly enhanced counts 16 and 17 with Hannah priors.

B. The Court Failed to State Aggravating Factors

Jacoby also argues that the trial court failed to make express findings of aggravating circumstances as to counts 16 and 17, as

required pursuant to A.R.S. § 13-702. State v. Rodriguez, 126 Ariz. 104, 612 P.2d 1067 (App. 1980). Since resentencing will occur because of the impermissible enhancement of these counts, this matter can be addressed on resentencing.

Trial Court's Communication with Jury

Finally, Jacoby argues that error occurred when the trial court impermissibly communicated with the jury after deliberations commenced. After deliberations began, the jury inquired:

> Were all the theft by control charges over $1,000.00 or more, specifically the Woolever case?

The trial court unsuccessfully attempted to contact Jacoby's attorney. The trial judge then proceeded to answer the jury's inquiry stating:

> The jury does not need to worry about the value on any counts pursuant to stipulation by both parties.

Defense counsel later objected to the trial court's response to the jury's question. Thereafter, the trial court explained its reason for answering the jury's question in the fashion it did:

> [W]ith respect to your argument about value, neither in your review of the verdict forms did you object to the verdict

forms which omitted value, nor did you argue to the jury that your client could be found not guilty on any of those charges because the State had failed to prove that property in excess of that listed in the indictment or any value. So for that reason your record or your objection is denied.

The record unequivocally establishes that during trial, Jacoby stipulated that the property in each count alleging value over $1,000 had a value over $1,000. Specifically, during the second day of trial, defense counsel objected to testimony being elicited regarding the value of certain keepsakes. In the ensuing bench conference, the following discussion occurred:

THE COURT: You want me to tell the jury you are not contesting value? Will you stipulate to that?

[Jacoby's Attorney]: Yeah.

Thereafter, the trial court informed the jury:

THE COURT: Ladies and gentlemen, with respect to the value of the property that you will be hearing in the course of this trial, the parties have stipulated that the items all have a value -- well, the items in each count have a value

greater than $1,000, so you are to accept that as a fact, that the items would have a value of over $1,000.

[Jacoby's attorney]: In the count where

THE COURT: In the count where there is value alleged.

[Jacoby's Attorney]: Where the value alleged is over $1,000. I think one count is less.

THE COURT: Wherever there is a value alleged over 1,000, 1,000 or more, the parties have stipulated that that is in fact a fact that has been accepted.

When Jacoby's attorney later made a record regarding the trial court's response to the jury's inquiry, he asserted that while the value of the property taken during the burglaries was not in issue, the value of the property found in Jacoby's possession was in issue. We disagree. Jacoby's attorney stipulated that the property alleged in each count involving over $1,000 or more had a value in excess of $1,000. The trial court's response to the jury's question did not go beyond the stipulation of the parties.

Erroneous jury communication does not require reversal if it can be said beyond a reasonable doubt that there was no prejudice to the defendant. State v. Sammons, 156 Ariz. 51, 57, 749 P.2d 1372, 1378 (1988); State v. Shumway, 137 Ariz. 585, 587, 672 P.2d 929, 931 (1983). Even assuming arguendo the jury communication here was erroneous, in view of the stipulation of counsel, we conclude that beyond a reasonable doubt, there was no prejudice to the defendant.

For the reasons set forth above, we affirm in part and reverse in part. We have searched the record for fundamental error and, other than as noted, found none.

CONCURRING: JOHN M. ROLL, Presiding Judge

LAWRENCE HOWARD, Judge

JAMES D. HATHAWAY, Judge

APPENDIX B

SUPREME COURT

STATE OF ARIZONA

Noel K. Dessaint
Clerk of Court

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329

Kathleen E. Kempley
Chief Deputy Clerk

Telephone: (602) 542-9396

December 18, 1991

RE: STATE OF ARIZONA vs. PETER ALLEN JACOBY aka PETER ALLAN JACOBY
Supreme Court No. CR-91-0350-PR
Court of Appeals No. 2 CA-CR 89-0248 / 2 CA-CR 90-0249 [Consolidated]
Pima County No. CR-23965 and CR-24274

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 17, 1991, in regard to the above-referenced cause:

Upon reading the motion to accept untimely petition for review and the opposition thereto,

And it appearing that this court's decision in State v. Sandon, 161 Ariz. 157, 777 P.2d 220 (1989), only resolved issues concerning

Arizona law relating to appellate and review procedures provided for persons convicted of offenses in Arizona,

And it appearing further that these procedures are no longer available in this case as to the issue presented in the admittedly untimely petition for review,

And it appearing further that the authority to determine threshold jurisdictional issues concerning federal habeas is vested solely in the federal courts, 28 U.S.C. Sec. 2254(b)(c), see also: Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L. Ed. 2nd 380 (1989),

RE: STATE OF ARIZONA vs. PETER ALLEN JACOBY aka PETER ALLAN JACOBY
Supreme Court No. CR-91-0350-PR
Court of Appeals No. 2 CA-CR 89-0248 / 2 CA-CR 90-0249 [Consolidated]
Pima County No. CR-23965 and CR-24274

IT IS HEREBY ORDERED that the motion to accept untimely petition for review is denied.

FURTHER ORDERED that the petition for review is dismissed.

FURTHER ORDERED that the motion to continue due date for Appellee's response is dismissed as moot.

Record returned to court of Appeals, Division Two, Tucson, this 18th day of December, 1991.

NOEL K. DESSAINT, Clerk

TO:

Hon. Grant Woods, Attorney General, 1275 West Washington, Phoenix, AZ 85007 ATTN: Paul J. McMurdie, Esq.
Richard M. Romley, Maricopa County Attorney, Administration Bldg, 301 West Jefferson, 8th Floor, Phoenix, AZ 85003 ATTN: Janet K. McNaughton, Esq.
Natman Schaye, Esq., P.O. Box 608, Tucson, AZ 85702
Joyce Goldsmith, Clerk, Court of Appeals, Division Two, 416 West Congress Street, Tucson, AZ 85701
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/cjt

APPENDIX C

[Filed August 20, 1992]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PETER ALLEN JACOBY,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIV 92-045-TUC-RMB
	)	
SAMUEL LEWIS, et al.,	)	
	)	
Respondents.	)	O R D E R
	)	

Peter Allen Jacoby brings a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. Petitioner challenges his convictions for theft and trafficking in stolen property. Petitioner alleges that an improper jury instruction violated his right to due process. The Court concludes that the jury instruction did not impermissibly shift the burden of proof to Petitioner, and hereby denies the present petition.

I.

Following a jury trial, Petitioner was convicted of one count of burglary, four counts of theft, and one count of trafficking in stolen property. Petitioner filed a timely appeal to the Arizona Court of Appeals. Arizona v. Jacoby, Nos. 2 CA-CR 89-0248 and 2 CA-CR 89-0249 (Ariz. Ct. App. April 19, 1990). On appeal, Petitioner contested the jury instruction at trial concerning an inference to be drawn from the possession of recently stolen property. Petitioner argued that the instruction improperly shifted the burden of proof to him, in violation of his right to due process. The court of appeals affirmed the conviction. Jacoby, Nos. 2 CA-CR 89-0248 and 2 CA-CR 89-0249, slip. op. at 6.

On July 3, 1991, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, contending that the jury instruction was improper. Jacoby v. Lewis, CIV-91-369-TUC-RMB (D. Ariz. July 3, 1991). This Court dismissed the petition without prejudice for failure to exhaust state remedies. Jacoby, CIV-91-369-TUC-RMB (Aug. 20, 1991) (order dismissing petition). On January 27, 1992, Petitioner again filed a

Petition for Writ of Habeas Corpus with this Court. Jacoby v. Lewis, CIV-92-045-TUC-RMB (D. Ariz. Jan. 27, 1992). This Court concluded that Petitioner had exhausted his administrative remedies, and ordered briefing on Petitioner's petition. Jacoby, CIV-92-045-TUC-RMB (June 24, 1992) order denying Respondent's summary judgment motion and granting Petitioner's cross-motion for summary judgment).

II.

Petitioner challenges his convictions for theft and trafficking in stolen property based on an allegedly improperly jury instruction. At the close of trial, the jury was given the following instruction:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession . . . was aware of the risk that it had been stolen or . . . participated in the theft.

Arizona v. Jacoby, CR-24275 and CR-23965, R. at 4 (March 17, 1989).[1]

> The trial court clarified the use of an inference:
>
> The word infer or the expression to draw inference means to find that a fact exists based on proof of another fact. An inference may be drawn only if it is reasonable and logical, not if it is speculative. Therefore in deciding whether to draw a particular inference you must look at and consider all of the facts in the light of reason, common sense and experience. After you have done that the question of whether to draw a particular inference is for you to decide.

Id. at 39. The question of whether this jury instruction is constitutional depends upon whether the instruction impermissibly

---

[1] In addition to this instruction, Respondents' refer to instructions provided by the trial court concerning burden of proof. The trial court instructed the jury that Petitioner was presumed innocent and that presumption alone was sufficient to acquit. Id. at 36. The court further stated that the State "must prove each element of the alleged crime or crimes beyond a reasonable doubt." Id. at 36–37. Boilerplate "presumption of innocence" instructions, however, cannot cure an erroneous burden shifting instruction.

shifts the burden of persuasion, or merely allows the jury to draw an inference.

The Due Process Clause of the Fourteenth Amendment prohibits the government from "using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion [to prove] beyond a reasonable doubt . . . every essential element of a crime." Francis v. Franklin, 471 U.S. 307, 313 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). In Francis, the United States Supreme Court held that the "threshold inquiry" is to ascertain the nature of the presumption at issue. Id. at 313-14. The court must determine "whether the challenged portion of the instruction creates a mandatory presumption, or merely a permissive inference." Id. at 314 (citations omitted).

A mandatory presumption "instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." Id. If the Court concludes that the statute at issue creates a mandatory presumption shifting the burden of persuasion to Defendants, or will appear to do so when the Court charges the jury on the statute, it is unconstitutional. Mandatory presumptions,

regardless of type, are unconstitutional if they relieve the government of its burden of persuasion on an element of the offense.[2] Id. at 314.

The constitutional question is whether a reasonable juror could understand the jury instruction as a mandatory presumption that shifts the burden of persuasion on an essential element once the government proves the predicate facts. Id. at 316. The Francis Court held that a mandatory rebuttable presumption is "perhaps less onerous from the defendant's perspective, but it is no less constitutional. Our cases make clear that '[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.'" Id. at 317.

Here the Court finds that the instruction at issue does not create a mandatory presumption. The trial court clearly stated that proof of possession of stolen property "gives rise to an inference."

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[2] Mandatory presumptions can be "conclusive" or "rebuttable." Id. at 314 n.2. "A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts . . . . A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted." Id.

The trial court did not state that once certain facts are found, the jury must draw that inference. Furthermore, the trial court elaborated upon the meaning of an "inference," stating that "[a]n inference may be drawn only if it is reasonable and logical, not if it is speculative." The trial court continued: "Therefore in deciding whether to draw a particular inference you must look at and consider all of the facts in the light of reason, common sense and experience. After you have done that the question of whether to draw a particular inference is for you to decide."

An instruction which contradicts, but does not explain the erroneous instruction, cannot cure an error. Id. at 321. In this instance, however, the instruction defining an inference did not contradict the trial court's instruction regarding possession of stolen property. Taken as a whole, the jury instructions suggest that the jury remains free to reject the inference if it so chose.

Accordingly, IT IS HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus be DENIED.

DATED this thirteenth day of August 1992.

RICHARD M. BILBY
U.S. District Judge

APPENDIX D

[Filed September 30, 1993]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER ALLEN JACOBY,	)	
	)	
Petitioner-Appellant,	)	No. 92-16583
	)	
v.	)	D.C.
	)	No. CV-92-00045
SAMUEL LEWIS, Director,	)	
ADOC; GRANT WOODS,	)	
Az. Atty. Gen.,	)	**MEMORANDUM***
	)	
Respondents-Appellees.	)	
	)	

Appeal form the United States District Court
for the District of Arizona
Richard M. Bilby, Chief District Judge, Presiding

Submitted and Argued August 31, 1993, San Francisco

Before: CHOY, D.W. NELSON, and NORRIS, Circuit Judges.

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*

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Peter Allen Jacoby, an Arizona State prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 Habeas Petition challenging his convictions for theft and trafficking in stolen property. Jacoby contends that a jury instruction given by the state trial court constituted an unconstitutional mandatory presumption which impermissibly shifted the burden of proof to the accused. We reverse and remand for further proceedings.

PROCEDURAL DEFAULT

The respondents contend that Jacoby's claim is procedurally barred by his failure to object to the jury instruction at trial. We disagree.

A federal court may not address a constitutional claim decided by a state court if that court's decision rests upon an independent and adequate state law ground. Coleman v. Thompson, 111 S. Ct. 2546, 2553-54 (1991). In order for a claim to be procedurally barred on federal habeas, the state court addressing the claim must clearly and expressly rely on an independent and adequate ground. Id. at 2557; see Harris v. Reed, 489 U.S. 255, 263-65 (1989); Hunter v.

Aispuro, 982 F.2d 344, 346 (9th Cir. 1992), petition for cert. filed, (July 1, 1993) (No. 93-5320).

Where the highest state court does not explain the reason for denying a claim, a federal habeas court must look back to the last reasoned state court decision to determine whether the claim is procedurally barred. Ylst v. Nunnemaker, 111 S. Ct. 2590, 2594 (1991). If the decision of the last state court fairly appears to rest primarily on federal law, or to be interwoven with federal law, a federal habeas court may address the merits of the claim. Coleman, 111 S. Ct. at 2557.

Here, the last reasoned decision, the decision of the Arizona Court of Appeals, does not rest upon an independent and adequate state ground. In Arizona, the failure to object at trial waives all but fundamental error. See State v. Valles, 780 P.2d 1049, 1054 (Ariz. 1989). Constitutional error is one type of fundamental error. See State v. Burton, 697 P.2d 331, 334 (Ariz. 1985). Because Jacoby did not object to the challenged jury instruction at trial, the court of appeals reviewed the merits of petitioner's claim for fundamental or constitutional error only. Therefore, the court of appeals did not

rely on a state procedural bar in dismissing Jacoby's claim, but instead addressed the constitutional question on the merits.

Because of the absence of a clear and express application of an independent and adequate state procedural rule by the Arizona Court of Appeals, Jacoby's claims are not in procedural default for purposes of his federal habeas petition. See Harris, 489 U.S. at 265; Hunter, 982 F.2d at 346. Therefore, we address the merits of this appeal.

JURY INSTRUCTION

Petitioner contends the state trial court violated his due process rights by giving the following jury instruction:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft.

A jury instruction which creates a mandatory presumption that relieves the state of the burden of persuasion on an element of the offense violate due process. Sandstrom v. Montana, 442 U.S. 510, 523-24 (1979). "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate

facts." Francis v. Franklin, 471 U.S. 307, 314 (1985). "A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." Id. Permissive inferences are generally not violative of due process unless "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." Franklin, 471 U.S. at 314-15; see Allen, 442 U.S. at 165, 166 n.28.

Here, the trial court instructed the jury that the possession of recently stolen property "gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen . . . ." The instruction further informed the jury that this presumption existed unless the possession of the property was "satisfactorily explained." Petitioner does not dispute that he possessed the property, but denies he was aware the property was stolen.[1]

Petitioner argues that the phrase "gives rise to an inference" involves a mandatory presumption because once the prosecution

---

[1] The stolen property was found in a box in the bed of petitioner's truck.

proved that the petitioner possessed the stolen property, the jurors could reasonably believe they were required to draw the inference that the petitioner knew the property was stolen. Petitioner suggests, by contract, that the phrase "may give rise to an inference" would be constitutionally sound as a permissive inference.

Petitioner further argues that the prejudice was increased by the fact that the jury may have interpreted the instruction as requiring Jacoby to satisfactorily explain that his possession of the stolen property was not knowing, thus shifting the burden of proof on an essential element of the crime to the accused. We agree that this portion of the jury charge could have been understood by reasonable jurors as creating a presumption that relieves the state of its burden of persuasion on an essential element of an offense. See Franklin, 471 U.S. at 314-15.

The next question, therefore, is whether the potentially offending words considered in the context of the charge as a whole, created an unconstitutional mandatory presumption. See id. Four pages in the transcript before the challenged instruction was given, the state trial court informed the jury as follows: "So while you should consider

only the evidence in the case, you are permitted, but not required to draw such reasonable inferences from testimony and exhibits as you feel justified in the realm of common sense and experience." The court further instructed that "[a]n inference may be drawn only if it is reasonable and logical, not if it is speculative." Finally, the court explained that "in deciding whether to draw a particular inference is for you to decide."

These additional instructions, however do not sufficiently explain the challenged language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional mandatory presumption. See id. at 315, 322 (language which contradicts, but does not explain the constitutionally infirm language will not absolve the infirmity). Reasonable jurors could have believed that the general instruction permitting them to draw inferences did not apply to the specific instruction challenged, particularly since the potentially "curative" instruction came well before the challenged instruction as part of a list of general jury instructions and definitions.

The final question we address is whether the error resulting from the burden shifting was harmless beyond a reasonable doubt. See Schwendeman v. Wallenstein, 971 F.2d 313, 316 (9th Cir. 1992) ("A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt."), cert denied, 113 S. Ct. 975 (1993). To establish harmless error, the state must convince this court that "there is no reasonable possibility that the error materially affected the verdict or, in other words, that the error was harmless beyond a reasonable doubt." United States v. Rubio-Villareal, 967 F.2d 294, 297 n. 3 (9th Cir. 1992) (en banc).

Petitioner argues he was convicted only on those charges to which the instruction applied. He was acquitted of those charges where no such burden shifting instruction was given. Under these circumstances, we cannot say that the error was harmless beyond a reasonable doubt. See Schwendeman, 971 F.2d at 316. Accordingly, we reverse the district court's denial of the habeas petition, and we remand with instruction to issue the writ of habeas corpus, unless, within a reasonable amount of time, Jacoby is granted a new trial.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX E

[Filed November 17, 1993]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER ALLEN JACOBY, Petitioner-Appellant, v. SAMUEL LEWIS, Director, ADOC; GRANT WOODS, Az. Atty. Gen., Respondents-Appellees.	)	No. 92-16583 D.C. No. CV-92-00045 **ORDER**

Before: CHOY, D.W. NELSON, and NORRIS, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

No. 93-1354

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

SAMUEL LEWIS, Director, Arizona Department of Corrections, and GRANT WOODS, Arizona Attorney General,

Petitioners,

-vs-

PETER ALLEN JACOBY,

Respondent.

On Petition for Writ of Certiorari to the United Stats Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

NATMAN SCHAYE
Counsel of Record for Respondent

P.O. Box 608
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No. 93-1354

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

SAMUEL LEWIS, Director, Arizona Department of Corrections, and GRANT WOODS, Arizona Attorney General,

Petitioners,

-vs-

PETER ALLEN JACOBY,

Respondent.

On Petition for Writ of Certiorari to the United Stats Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

NATMAN SCHAYE
Counsel of Record for Respondent

P.O. Box 608
Tucson, Arizona 85702
(602) 743-9940

QUESTIONS PRESENTED

I. Whether this Court should grant certiorari to determine whether the court of appeals correctly reached the merits of an issue raised in habeas corpus that had been decided on its merits by the last state court to issue a decision, particularly when no conflict exists between the courts of appeals.

II. Whether this Court should grant certiorari to again rule that jury instructions which shift the burden of proof to the defense violate due process. Whether this error was prejudicial in light of the fact that Respondent was convicted only of the charges affected by the erroneous instruction.

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STATEMENT OF THE CASE

The Statement of the Case provided by Petitioners, government officials for the State of Arizona, is -- in one sense -- accurate. It is accurate in that all of the facts that it contains are supported by the record. However, omissions from that statement result in a misleading rendition of the facts. For that reason, the following statement of pertinent facts is provided.[1]

Respondent, Peter Allen Jacoby, was charged in the state trial court with four counts of burglary, four counts of controlling property stolen in those burglaries, one count of trafficking in stolen property, and one count of possession of cocaine.[2]

Mr. Jacoby was arrested on the trafficking in stolen property charge after he sold a clarinet that had been taken in a residential burglary. A search of his truck incident to that arrest revealed a vial of cocaine on the truck seat next to where Mr. Jacoby had been sitting.[3] A search of the bed of the truck resulted in the seizure of property stolen in three separate burglaries. This property formed the basis for three of the burglary and three of the theft counts.

Mr. Jacoby was released following that arrest. Police officers later followed him to a residence; when he left, the

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[1]For a more detailed statement of the facts, see the Arizona Court of Appeals memorandum decision, Petitioners' Appendix A, at 2-4.

[2]Mr. Jacoby faced other charges, but they have no relevance here.

[3]This vial formed the basis for the possession of narcotics charge.

officers discovered that the residence had been burglarized. Mr. Jacoby was arrested for that burglary and the accompanying theft.

At trial, Mr. Jacoby testified in his own defense as follows:

1. As to the cocaine charge, although he admitted having a "severe cocaine problem"[4], he denied having any knowledge of the cocaine found on his truck seat.
2. As to the trafficking in stolen property charge, he denied knowing that the clarinet was stolen.
3. As to the burglary and theft charges arising from the property found in his truck at the time of his first arrest, he stated that he was moving the property for a friend and did not know that it was stolen.
4. He admitted having committed the burglary and theft preceding his second arrest.

The trial court gave the following instruction pertinent to the trafficking and theft charges:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in the theft.

The jury returned guilty verdicts only on the charges affected by the foregoing instruction (the trafficking and three theft charges) and the offenses to which Mr. Jacoby confessed in his trial

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[4]Pet. App. A, at 4.

testimony (one count of burglary and one count of theft[5]). He was acquitted of the cocaine charge. The jury could not reach a verdict on the other burglary charges, which were subsequently dismissed.

Trial counsel for Mr. Jacoby did not object to the foregoing instruction. Mr. Jacoby did argue in the Arizona appellate courts and in his habeas action that the instruction violated his right to due process.

ARGUMENT

I

THE COURT OF APPEALS WAS CLEARLY CORRECT IN DECIDING THIS CASE ON ITS MERITS. NO CONFLICT EXISTS BETWEEN THE CIRCUITS.

The Ninth Circuit Court of Appeals was clearly correct in deciding the merits of Mr. Jacoby's claim. In attempting to convince this Court that the court of appeals erred in deciding this case on its merits, Petitioners assert that the court of appeals memorandum decision is contrary to the decisions of this Court. Petitioners' claim is based on a misunderstanding of the law of preclusion applicable to habeas corpus proceedings, as well as a misstatement of Arizona's waiver rule. Next, Petitioners claim that a conflict exists between the First and Ninth circuits, and ask this Court to resolve it. An examination of the cases reveals, however, that no such conflict exists. For the following reasons, no error occurred below and no sound basis exists for the

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[5]Mr. Jacoby did not challenge those convictions by his petition for a writ of habeas corpus, and they are not at issue here.

granting of certiorari.

A. Applicable Supreme Court Law

The Petition for Certiorari opens with an inaccurate statement of the law of preclusion. Petitioners assert that a state procedural bar will automatically be applied by the federal courts "so long as the state has a contemporaneous objection rule and has not waived its enforcement." Petition for Certiorari, at 8-9.

In *Harris v. Reed*, 489 U.S. 255, 261 (1989), the Court clearly stated, "[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim . . ." The Court later explained, "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." (footnote omitted). *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2557, 115 L.Ed.2d 640 (1991). The state court of appeals' analysis of the substantive issue presented here applied decisions from this Court interpreting the due process clause of the fourteenth amendment, and was clearly not independent of the federal claim.

On direct appeal, the state court first made note of the decisions from this Court relevant to the issue of whether the challenged instruction violated due process. Pet. App. A, at 5-6. The court then recognized that a conflict existed between the

Arizona intermediate appellate courts as to the constitutionality of the instruction. *Id.* at 6-7. Finally, the court stated that, due to trial counsel's failure to object, Mr. Jacoby could prevail only if the instruction constituted "fundamental error". The court rejected Mr. Jacoby's claim, stating that it had "expressly held" that the challenged instruction did not constitute "fundamental error". *Id.* at 7, *citing State v. Dickson*, 127 Ariz. 554, 622 P.2d 501 (App. 1980) and *State v. Van Winkle*, 126 Ariz. 476, 616 P.2d 936 (App. 1980).

Arizona's appellate courts have chosen to include federal constitutional error in their definition of "fundamental error"; the state courts must determine whether the Constitution was violated to determine whether fundamental error occurred. In fact, the state appellate decision in this very case proves that point. The court stated that the challenged instruction had been held not to constitute "fundamental error" in *State v. Dickson* and *State v. Van Winkle*, *supra*. In *Dickson*, 662 P.2d at 501, the holding that fundamental error occurred came in the statement, "The instruction was not a denial of due process," *citing Sandstrom v. Montana*, 442 U.S. 510 (1979). Similar language was used in *Van Winkle*, which also cited *Sandstrom*. 616 P.2d at 937. The Arizona Supreme Court has very clearly and simply pronounced that its search for fundamental error includes a search for constitutional error; in *State v. Burton*, 144 Ariz. 248, 697 P.2d 331, 334 (1985), the court stated, "Constitutional error is one form of fundamental error." Under substantially identical circumstances, this Court recognized

that a search for constitutional error by a state court precludes a finding that the state procedural bar is "independent" of federal law. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Petitioners seek to draw this Court's interest with a claim that, "Because Arizona appellate courts review every criminal case for fundamental error, a criminal defendant will never be found to have procedurally defaulted on any issue raised on appeal even though the defendant failed to raise the issue at trial." Petition for Certiorari, at 11. First, the claim that the state appellate courts search for fundamental error in every case is unsupported. More importantly, however, the decision of whether the state courts will review federal constitutional claims that were not preserved at trial is a decision for the state courts. Even assuming that Arizona's courts conduct such a review, that fact is not of concern to this Court. The rules requiring federal courts to abide by state court findings of preclusion are premised on:

> "[T]he doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' *Darr v. Burford*, 339 U.S. 200, 204 (1950)." [*Rose v. Lundy*], 455 U.S. [509], 518 [(1982)].

Coleman v. Thompson, 111 S.Ct. at 2555. By considering issues of fundamental error (including constitutional error) first raised on direct appeal, the Arizona courts exercise their opportunity to pass upon the merits of those issues. Under these circumstances, there is no reason for the federal courts to refrain from reviewing

such state court rulings. If Petitioners are unhappy with the fact that Arizona's courts decline to bar appellants from litigating federal constitutional issues first raised on direct appeal, Petitioners must complain to the Arizona courts.

B. Absence of Conflict Between Circuits

Petitioners also seek to draw this Court's attention by claiming that the court of appeals decision in the present case conflicts with the decision from the First Circuit Court of Appeals in *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987). A comparison of the respective bases for the two decisions reveals that no such conflict exists.

In *Puleio*, the habeas petitioner raised an objection to a jury instruction for the first time in his direct appeal to the state supreme court in contravention to the state's contemporaneous objection rule. *Id.* at 1199. The court reviewed the claim of error to determine whether, under state law, a miscarriage of justice occurred; this review did not include a search for federal constitutional error. In the words of the First Circuit:

> It is altogether evident that the [state supreme court's] consideration of the alleged instructional error in Puleio's case "went not to the *federal* question of . . . constitutional sufficiency, but to the *state* law question of whether a 'substantial risk of a miscarriage of justice' was present." *Gibson v. Butterworth*, 693 F.2d 16, 17 (1st Cir. 1982)(emphasis in original).

Id. at 1200. In short, the Arizona state courts have chosen to review issues first raised on direct appeal for constitutional error; the Massachusetts courts have chosen not to conduct such a

review. This distinction is the basis for the opposite conclusions reached by the federal appellate courts in *Puleio* and in the case at bar.

Should any doubt remain, the First Circuit pointed out that the state supreme court in *Puleio* made no reference to federal law or decisions. *Id.* at 1201. In contrast, the Arizona decision in the present case, as well as the decisions on which it relied, *State v. Dickson* and *State v. Van Winkle, supra*, cited opinions from this Court applying the Due Process Clause to burden shifting jury instructions.

In summary, the court of appeals memorandum decision in the present case is perfectly consistent with this Court's rulings concerning preclusion. There is no conflict between the First Circuit and the Ninth Circuit. There is therefore no reason for this Court to consider the merits of Petitioners' claim.

II

THE INSTRUCTION AT ISSUE VIOLATED DUE PROCESS AS DEFINED BY THIS COURT. THE INSTRUCTION AFFECTED THE OUTCOME OF THE TRIAL.

A. The Instruction Shifted the Burden of Proof.

One of the most fundamental dictates of due process is that the prosecution must prove every element of a criminal accusation beyond a reasonable doubt. *See, e.g., Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358 (1970). This Court has repeatedly ruled that a jury instruction which shifts the burden of proof to the defense violates the Due Process Clause. *Frances v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Patterson v. New*

York, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship, supra.*[6]

In the present case, the state trial court instructed the jury that the possession of recently stolen property "gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen . . ." (Pet. App. A, at 5). The instruction further informed the jury that this presumption existed unless the defendant was able to "satisfactorily explain" his possession of the property. (*Id.*). This instruction was critical due to the fact that Mr. Jacoby did not dispute that he possessed stolen property, but did dispute the claim that he was aware that the property had been stolen. *See Sandstrom v. Montana*, 442 U.S. at 521-522, *quoting Morissette v. United States*, 342 U.S. 246, 274-275 (1952).

It is clear that the challenged instruction violated the consistent rulings of this Court. The Court has distinguished between "permissive inferences" - which comply with due process - and "mandatory presumptions" - which do not. *Frances v. Franklin*, 471 U.S. at 313-314. More specifically:

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. [Footnote omitted] A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that

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[6]Although Division Two of the Arizona Court of Appeals held that Mr. Jacoby's constitutional rights were not violated by the challenged instruction (Pet. App. A, at 6-8), Division One of the same court held to the contrary. *See State v. Mohr*, 150 Ariz. 564, 724 P.2d 1233, 1236 (App. 1986).

conclusion.

Id. at 314. If a reasonable juror "could have" interpreted a challenged instruction as creating a mandatory presumption, a due process violation is established. *Id.* at 315, *quoting Sandstrom v. Montana*, 442 U.S. at 514.

The challenged instruction in the present case clearly violated due process. The only factual issue presented regarding the challenged convictions was whether or not Mr. Jacoby was aware of the fact that the property he possessed was stolen. The jury was instructed that his possession of such property "gives rise to an inference" that he was aware that the property was stolen. The jury was required to draw the inference. The jurors could legitimately have been told that evidence of possession may give rise[7] to an inference that the accused knew that the property was stolen, but that language was not used. The prejudice was substantially increased by the fact that the jury was told that it must draw the critical inference unless Mr. Jacoby "satisfactorily explained" otherwise. This clearly shifted the burden of proof to the defense to prove that Mr. Jacoby was unaware that the property he possessed had been stolen.

Petitioners argue, at 14-15, that an earlier[8] general

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[7]The Arizona statute that sets forth the inferences arising from stolen property has been amended so that the possession of recently stolen property "may give rise" to an inference that the possessor is aware of the character of the property. A.R.S. §13-2305(1).

[8]The general instruction is found in the transcript four pages before the burden shifting instruction. (Pet. App. D, at 6-7).

instruction -- "[T]he question of whether to draw a particular inference is for you to decide," -- corrected the specific burden shifting instruction at issue here.[9] This alleged "clarifying instruction" can support the state's position only if, "The jury charge taken as a whole might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." *Frances v. Franklin*, 471 U.S. at 318-319, *citing Cupp v. Naughten*, 414 U.S. 141 (1973). It is apparent that a reasonable juror in the present case could have: 1) understood that the specific inference concerning possession of stolen property was mandatory, while the general permissive inference instruction applied to other elements and other offenses; or 2) seen the instructions as contradictory. In either case, the court of appeals correctly concluded that due process was violated. *Id.* at 321-322.

B. The Violation of Due Process Was Not Harmless.

Finally, Petitioners claim that the court of appeals applied the wrong harmless error standard. Petitioners argue that the appellate court should have made a determination as to whether Mr. Jacoby suffered "actual prejudice" from the burden shifting

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[9]Petitioners argued both in the court of appeals and in their Petition for Certiorari that defense counsel's closing argument corrected the burden shifting instruction. Such a claim is baseless and was properly ignored by the court of appeals, as it must be here.

instruction[10], instead of applying a "harmless beyond a reasonable doubt" standard.[11] The instruction at issue violated due process because it infected the entire trial and therefore was properly considered under the harmless error standard. This conclusion is well supported by the court of appeals' analysis in *Suniga v. Bunnell*, 998 F.2d 664, 666-667 (9th Cir. 1993).

More importantly, the error in the present case required reversal under either standard. In fact, it would be difficult to find a clearer demonstration of the impact of an erroneous instruction. The jury was told to infer that the possession of stolen property carried with it knowledge that the property was stolen. Mr. Jacoby was alleged to have committed burglaries and controlled the property taken in the burglaries. He testified that he did not commit the burglaries at issue, that his confession to the police was false, and that he did not know the property recovered from his truck was stolen. He was convicted of knowingly controlling stolen property -- the charges affected by the instruction -- but was not convicted of the burglaries.

Even more significantly, a vial of cocaine was found on the seat next to where Mr. Jacoby was sitting in his truck. He testified at trial that he was a heavy cocaine user. Despite these inculpatory facts, the jury -- hearing no burden shifting instruction on the drug charge -- acquitted Mr. Jacoby of knowingly

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[10]*Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993).

[11]*Chapman v. California*, 386 U.S. 18, 24 (1967).

possessing cocaine.

In short, Mr. Jacoby was convicted only of the charges tainted by the erroneous instruction. The court of appeals was correct in reversing the convictions for the tainted charges.

CONCLUSION

The court of appeals correctly decided this case on its merits. Clear precedents from this Court establish that the Due Process Clause was violated and that prejudice resulted from that violation. It is therefore respectfully submitted that the Petition for Certiorari be denied.

NO. 93-1354

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

PETITIONERS,

-VS-

PETER ALLEN JACOBY,

RESPONDENT.

STATEMENT OF MAILING
AFFIDAVIT OF SERVICE
REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL OF
THE STATE OF ARIZONA

PAUL J. McMURDIE
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ATTORNEYS FOR PETITIONERS

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

KENT E. CATTANI, being first duly sworn upon oath, deposes and says:

That he is a member in good standing of the United States Supreme Court Bar.

That on June 15, 1994, he caused to be shipped via Airborne Express, 40 copies of the REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, in SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA, No. 93-1354, addressed to:

THE HONORABLE WILLIAM K. SUTER
United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

and caused to be deposited for mailing three (3) copies addressed to:

NATMAN SCHAYE
P.O. Box 608
Tucson, Arizona 85702
Telephone: (602) 743-9940

Attorney for RESPONDENT

That to his knowledge the mailing of the Petition took place on June 15, 1994.

Kent E. Cattani
KENT E. CATTANI

(3)

Supreme Court, U.S.
FILED
JUN 15 1994
OFFICE OF THE CLERK

No. 93-1354

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA Attorney General,

PETITIONERS,

-vs-

PETER ALLEN JACOBY,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I

THE NINTH CIRCUIT COURT OF APPEALS ERRED BY RULING THAT A STATE APPELLATE COURT'S REVIEW FOR FUNDAMENTAL ERROR IN CRIMINAL CASES VITIATES ANY PROCEDURAL BAR CREATED BY A DEFENDANT'S FAILURE TO RAISE AN ISSUE AT TRIAL.

Jacoby does not dispute that the State of Arizona has a contemporaneous objection rule, or that he failed to object to the jury instruction to which he now takes issue. Jacoby argues simply that, because the Arizona Court of Appeals considered the merits of his claim of error as part of a "fundamental error" analysis, he cannot be deemed to have procedurally defaulted on that claim.

Jacoby's argument is inconsistent with a long line of cases from this Court affirming the importance of the contemporaneous objection rule. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 124–29 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Estelle v. Williams*, 425 U.S. 501, 508 n.3 (1976). Contemporaneous objections ensure that the trial court is informed of possible errors and given the opportunity to prevent or correct defects at the time when they are most easily cured. *Engle v. Isaac*, 456 U.S.

at 128–29; *Williams*, 425 U.S. at 508 n.3. This in turn prevents problematic retrials months or years later that unnecessarily burden the system and frustrate the goals of discerning truth and dispensing justice. *Engle*, 456 U.S. at 128–29. In contrast, the failure to timely raise an objection detracts from the significance of the trial, reduces the finality of litigation, and undercuts the State's ability to enforce its procedural rules. *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Engle*, 456 U.S. at 129. Without the contemporaneous objection rule, the appellate court cannot serve the function for which it was designed and is best suited—reviewing the trial court, rather than deciding issues in the first instance. *Carrier*, 477 U.S. at 487.

In *Engle v. Isaac*, Isaac brought a habeas corpus action challenging the constitutionality of a jury instruction given during his trial in an Ohio state court. Isaac did not object to the instruction at trial, and the Ohio Court of Appeals refused to entertain his challenge to that instruction. The Ohio court cited Isaac's failure to

comply with Ohio's contemporaneous objection rule,[1] and dismissed his claim for lack of a substantial constitutional question. 456 U.S. at 125 n.27. Isaac argued in his habeas petition that, because the Ohio appellate courts engage in a "plain-error" review, and because Ohio courts may excuse procedural default as part of such a review, his claim was not barred from federal habeas review. *Id.*

This Court rejected Isaac's argument. Noting that the Ohio plain-error rule applies only in "exceptional circumstances," such as where, "but for the error, the outcome of the trial clearly would have been otherwise," this Court ruled that the Ohio courts had not excused Isaac's procedural default. *Id.*

The Ninth Circuit's ruling in the present case is inconsistent with *Engle v. Isaac*, and should be rejected by this Court. Although it is unclear whether the Ohio court addressed the merits of Isaac's claim to the same extent as did the Arizona Court of Appeals in the present case, the principles underlying *Engle* are equally applicable in Arizona. The Ninth Circuit's ruling in the present case

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1. Ohio Rule of Criminal Procedure 30 requires contemporaneous objections to jury instructions. 456 U.S. at 125. Failure to comply with Rule 30 bars appellate consideration of an objection. *Id.*

effectively eliminates the contemporaneous objection rule in Arizona. Arizona appellate courts review every criminal case for fundamental error. A.R.S. § 13–4035; *State v. Herrera*, 176 Ariz. 21, 35, 859 P.2d 131, 145, *cert. denied*, 114 S. Ct. 398 (1993). Accordingly, under the rationale suggested by the Ninth Circuit, a criminal defendant in Arizona will *never* be found to have procedurally defaulted on *any* issue raised on appeal even though he or she failed to raise the issue at trial. Such a result wipes out the contemporaneous objection rule, and should be rejected by this Court. As with the defendant in *Engle*, Jacoby procedurally defaulted on his claim that a jury instruction was improper, and that claim should not be addressed as part of a federal collateral review.

Jacoby's reliance on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), is unavailing. In *Ake*, this Court excused—on direct appeal from the Oklahoma Supreme Court —the defendant's procedural default because "the State had made application of the procedural bar dependent on an antecedent ruling

on federal law."[2] 470 U.S. at 75. At trial, Ake requested a psychiatric evaluation at state expense to determine his mental state at the time of the offense. *Id.* at 72. The trial court rejected his request, and he was unable to present testimony to support his sole defense, insanity. *Id.* Ake filed a motion for new trial, but did not repeat his request for a psychiatric evaluation in that motion. After the motion was denied, Ake filed a direct appeal with the Oklahoma Court of Criminal Appeals, arguing, among other things, that he should have been provided the services of a court-appointed psychiatrist. *Id.* at 73. The Oklahoma Court of Criminal Appeals rejected his argument on the merits, then also ruled that he had waived the claim by not raising it in his motion for a new trial. *Id.* at 74.

On direct review, this Court reversed and ruled that, because under Oklahoma law, federal constitutional errors cannot be waived, the Oklahoma court had necessarily addressed the merits of the federal constitutional claim before applying a procedural bar. Thus,

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2. Under Oklahoma law, federal constitutional claims cannot be waived. *Ake*, 470 U.S. at 74–75.

this Court ruled that Oklahoma had made the application of the procedural bar dependent on an antecedent ruling on federal law, and the issue was preserved for consideration on direct appeal. *Id.* at 74–75.

In Arizona, unlike Oklahoma, federal constitutional claims can be waived. *See State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1185 (1993) (defendant's claims that voir dire was inadequate and that his rights to be present and to be represented by counsel during voire were violated deemed waived because he failed to object at trial); *State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) (*Batson* claim waived by failure to object during voire dire). Thus, the rationale underlying this Court's ruling in *Ake* is not applicable in this case.

Furthermore, *Ake* did not involve the enforcement of a state contemporaneous objection rule. The issue in *Ake* had been presented at trial, and the trial court had been given an opportunity to consider it during trial, when the error could most easily have been cured. *Ake* does not stand for the proposition that the

contemporaneous objection rule should be abolished, and is not controlling in the present case.

Finally, *Ake* was a "direct appeal" to this Court, and did not involve the same concerns present on collateral review. In *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), this Court noted that *Ake* was a direct review case, and has never been applied in federal habeas cases. 111 S. Ct. at 2560. Because of the concerns of comity and finality present on collateral review, and because of the importance of the contemporaneous objection rule, this Court should not extend *Ake* to this case.

The Ninth Circuit's approach in the present case directly contradicts the approach taken by two other circuit courts of appeal. As noted in the State's Petition for Writ of Certiorari, in *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987), the First Circuit Court of Appeals rejected the same type of "implicit consideration" argument advanced by Jacoby in the present case. Similarly, in *Hayes v. Lockhart*, 766 F.2d 1247 (8th Cir. 1985), the Eighth Circuit Court of Appeals rejected an "implicit consideration" argument. In *Hayes*, the defendant failed to object to what he later claimed was a

defective jury instruction. The Arkansas Supreme Court declined to reach the merits of the claim, but ruled—as part of a "plain error" analysis—that the instruction was not prejudicial. 766 F.2d at 1252. The defendant filed a habeas petition, which was denied by the federal district court. *Id.* The Eighth Circuit affirmed the district court's ruling, rejecting the defendant's argument that, because the Arkansas Supreme Court rejected the claim as part of a "plain error" analysis, the defendant was somehow entitled to an independent federal court determination of the issue. *Id.*

Jacoby's attempt to distinguish *Puleio* is unpersuasive. Jacoby argues that the type of review engaged in by the Massachusetts appellate courts differs from that engaged in by the Arizona courts. Although the terminology employed by the Massachusetts courts may differ from that used by Arizona courts, the differences are minor, and do not provide a basis for distinguishing *Puleio* from the instant case. Massachusetts law provides that state appellate courts may reach the merits of an appeal, notwithstanding procedural default, to determine whether a "miscarriage of justice" likely occurred. *Puleio*, 830 F.2d at 1200. In *Puleio*, the First Circuit noted that the

Massachusetts appellate court's consideration of the alleged instructional error in Puleio's case "went not to the *federal* question of . . . constitutional sufficiency, but to the *state law question of whether a* 'substantial risk of a miscarriage of justice' was present." *Id.*, *citing Gibson v. Butterworth*, 693 F.2d 16, 17 (1st Cir. 1982).

The Massachusetts miscarriage-of-justice review is very similar to the fundamental-error review engaged in by Arizona appellate courts. The "fundamental-error" review by Arizona appellate courts is not simply a review for federal constitutional error. Fundamental error only results upon a finding of "error of such dimension that it cannot be said it is possible for a defendant to have had a fair trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Furthermore, as noted earlier, the Arizona Supreme Court has ruled that federal constitutional claims can be waived. *Bible*, 175 Ariz. at 572, 858 P.2d at 1185; *Holder*, 155 Ariz. at 85, 745 P.2d at 143. Thus, Arizona's "fundamental-error" review is necessarily a review for something more than simply federal constitutional error. As with the "miscarriage of justice" review in Massachusetts, Arizona's fundamental-error review goes beyond a finding of constitutional

error, and looks to the overall fairness of the trial. The fact that Massachusetts engages in a miscarriage-of-justice review, rather than a fundamental-error review, is a distinction without a difference, and does not provide a basis for distinguishing *Puleio* from the instant case.

II

THE NINTH CIRCUIT ERRED BY REVERSING THE DEFENDANT'S CONVICTIONS FOR THEFT AND TRAFFICKING IN STOLEN PROPERTY ON THE BASIS THAT A JURY INSTRUCTION REGARDING INFERENCES TO BE DRAWN FROM THE POSSESSION OF RECENTLY STOLEN PROPERTY IMPROPERLY SHIFTED THE BURDEN OF PROOF.

Jacoby contends that the fact that he was acquitted of some of the burglary charges against him, while at the same time being convicted of theft, shows that the jury instruction at issue could not have been harmless error. Jacoby argues that because the instruction did not apply to the burglary charges, "it would be difficult to find a clearer demonstration of the impact of an erroneous instruction." (Brief in Opposition to Certiorari, at 12.) The State disagrees because a more plausible explanation for Jacoby's acquittal of some of the burglary charges is the differing elements of proof required to

establish burglary and theft. Pursuant to A.R.S. § 13–1802, theft is defined as unlawfully controlling property of another with the intent to deprive that person of such property. Pursuant to A.R.S. § 13–1507, burglary is defined as the unlawful entrance of a residential structure with the intent to commit a theft. In the present case, the evidence establishing that Jacoby had burglarized several residences was circumstantial; the residences had been burglarized, and the day after the burglaries the property was found in Jacoby's truck. Because there could be differing explanations for how the property turned up in Jacoby's truck, there was a reason the jurors acquitted Jacoby of burglary, while at the same time convicting him of theft.

Finally, Jacoby's argument that his acquittal of a cocaine possession charge demonstrates that the instruction in question was not harmless error is unpersuasive. The fact that he was acquitted of that charge notwithstanding evidence that he was a cocaine user and that a vial of cocaine was found on the seat next to where he was sitting shows nothing more than uncertainty on the part of the jurors regarding who owned the cocaine. There was no such

uncertainty regarding ownership of the stolen property found in Jacoby's truck. Thus, Jacoby's good fortune in being acquitted of a cocaine possession charge does not help him in his attempt to establish that the jury instruction in question was not harmless error.

CONCLUSION

This Court should accept certiorari in this case to resolve the conflict between the Ninth Circuit and the First and Eighth Circuits on the issue of whether a state appellate court's review for fundamental error in a criminal case vitiates any procedural bar created by a defendant's failure to raise an issue at trial. This Court should adopt the approach taken in the First and Eighth Circuits, and reject the Ninth Circuit's decision to address the merits of Jacoby's claim notwithstanding his failure to raise the claim at trial.

This Court should also accept certiorari because the Ninth Circuit erred by finding that the trial court improperly instructed the jurors, and because the Ninth Circuit applied an incorrect harmless error standard. The instruction at issue was not improper, and did

not shift the burden of proof to Jacoby. His convictions should be affirmed.

Respectfully submitted,

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